Office-Supreme Court, U.S.
FILED
NOV 27 1967
JOHN F. DAVIS, CLERK

No. 834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

READING COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY TO AFFIRM

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November 27, 1967

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Appellees The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) respectfully submit that the final judgment of the District Court dismissing the complaint of Reading Company (Reading) was correct and should be summarily affirmed.

STATEMENT

Appellant Reading is controlled by The Chesapeake and Ohio Railway Company and The Baltimore and Ohio Railroad Company (C&O-B&O), who have also taken an appeal from the judgment of the District Court on grounds different from those pressed by Reading. On the prior appeal before this Court, Reading filed a joint brief with

C&O-B&O and certain other railroad appellants and presented no separate oral argument. In neither brief nor argument was it claimed that the Commission's order was defective because Reading had not been given an adequate opportunity to be heard on the injury that would be caused it by the Penn-Central merger or to press for interim protective conditions similar to those formulated for Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D&H) and Boston & Maine Corporation (B&M).

On this appeal Reading, which did not see fit even to mention the argument when the case was last here, claims that its very life depends upon the Commission giving it such protective conditions and that the Commission has unreasonably refused to hear its evidence to that effect.[1]

Reading has been a party to this case since its beginning in the Commission more than five years ago. During the extensive hearings that took place in 1962 and 1963 it presented no evidence, undertook no cross examination of witnesses and expressed no opposition to the merger. It made two requests only: that it be given standard routing conditions (which were duly given it by the Commission)

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[1]At the time of the prior appeal, The Central Railroad Company of New Jersey (CNJ) was, as Reading is now, controlled by C&O-B&O. CNJ filed a separate reply brief and made a separate oral argument, pressing on its own behalf alone the very contentions that Reading now presents. Since the prior appeal CNJ has been removed from C&O-B&O control by bankruptcy. It no longer argues that it needs protective conditions similar to those given E-L, D&H and B&M as protection from the Penn-Central merger.

Reading's statement that CNJ is negotiating with Penn and Central for such protection (J. S., p. 7) is not correct. The negotiations being conducted relate not to protection from the consequences of the Penn-Central merger as such, but solely to protection from any effects of the inclusion of the New York, New Haven and Hartford Railroad Company (New Haven) in the transaction. Reading has had a full hearing before the Commission on this subject, and has been granted protection. (See p. 5, *infra*)

and that Penn be required to dispose of its stock in Norfolk and Western Railway Company (N&W) (which Penn voluntarily agreed to do). Reading filed no brief before the Examiners.

In the course of the hearings the Commonwealth of Pennsylvania introduced into evidence a letter from the President of Reading responding to an inquiry of the Commonwealth about the effect of the proposed merger on Reading. The letter, a copy of which is attached to the Brief of Penn and Central on Final Hearing in the District Court filed with this Court (and which is discussed in the District Court's opinion (B&O J. S., pp. B-19-20)), stated that it was "possible" that there would be diverted a specified portion of Reading's traffic (comprising less than 3% of its carloadings) interchanged with Central. With respect to traffic interchanged with Penn the letter stated that "our study did not include traffic interchanged with the Pennsylvania since its merger with the New York Central would not appear to threaten this traffic. The Pennsylvania would now be handling it if this were physically feasible."[2]

In their report the Examiners found as to Reading and certain other carriers that the merger's "net effect will not be detrimental to such carriers individually or to their ability to provide a general transportation service to the public."

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[2]That Reading's position as to lack of substantial injury was no inadvertence or oversight is strongly suggested by the fact that CNJ, then under joint control with Reading and a participant in much of the traffic handled by Reading, took a very similar position. During the hearings there was introduced into evidence a letter statement by CNJ's President that that road had concluded "after careful consideration by our interested people" that CNJ would be strengthened rather than harmed by the merger and that "we have no grounds to oppose." A copy of this letter is also attached to our Brief on Final Hearing in the District Court.

(Proposed Report, at p. 305) Reading filed no exception to this finding.[3]

After the Commission's approval of the merger by its report and order of April 6, 1966, Reading filed a petition for reconsideration. It claimed that the indemnification provisions that the Commission had adopted for E-L, D&H and B&M were unlawful, but that if those roads were to be given such indemnification Reading should be also. It claimed also that the Commission's adoption of the Examiners' finding as to the lack of injury to Reading (to which finding Reading had, as we have noted, failed to except) should be withdrawn. The ground offered for the latter claim was that the finding might prejudice Reading in *other proceedings*—notably the N&W Inclusion case and the N&W-C&O Merger case—by precluding it from claiming in these proceedings injury from the merger of Penn and Central.

The Commission responded to Reading's contentions as follows: It directed, and subsequently held, a hearing on the indemnification provisions for E-L, D&H and B&M. In that hearing, which culminated in the Commission's report and order dated June 9, 1967 (330 I. C. C. 328), Reading was given an opportunity to show, and attempted to show, that the protective conditions prescribed for E-L D&H and B&M would inflict injury upon it. The Commission found that the evidence did not support Reading's contention that the conditions would cause it such injury. (330 I. C. C. at pp. 353-56) The Commission declined to reopen the record to hear evidence from Reading as to the injury that it would allegedly be caused by the Penn-Central merger as such, and apart from the protective conditions prescribed for other carriers. The Commission stated with regard to

[3]This omission is particularly significant in light of the fact that Reading did file exceptions with respect to other matters not relevant here.

Reading and C&O, B&O and CNJ, all of which had sought the same relief, that:

> "Their measured and deliberate silence during the hearing support the inference that they saw more to be gained thereby in their own system-building aspirations than would result from forceful opposition likely to arouse counter opposition.
>
> "Now, with the N&W-Nickel Plate merger and the C&O-B&O control transactions safely beyond challenge, and put into effect with remarkable success, petitioners have nothing to lose and perhaps much to gain by breaking their silence. Delay alone works in their favor. By requesting this 'second chance' to show adverse impact, petitioners are asking, in effect, that we begin anew to gather data and then practically to reappraise the entire merger. To this we cannot accede." (328 I. C. C. at p. 317)

The Commission did modify the form of its finding as to the lack of injury to Reading to state that such injury had not been shown (*id.* at p. 318), thereby obviating the specific objection that Reading had expressed to the prior finding. (See p. 4, *supra*)

In addition to the full hearing that Reading has thus received on the question whether the protective conditions for E-L, D&H and B&M will injure it, it has also had a full hearing on the question whether the inclusion of New Haven in Penn-Central will divert traffic from it and if so what protective conditions may be required, and has been granted certain protective conditions by the Commission.[4]

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[4]This hearing was initially provided for in Appendix A, paragraph 8 of the Commission's order of April 6, 1966. (See 327 I. C. C. at p. 553) The protective conditions formulated by the Commission for Reading as a result of this hearing are discussed at pages 123-33 of the Second Supplemental Report of the Commission, dated November 16, 1967, and issued November 21, 1967, copies of which have been supplied to this Court.

And in the future it will have the opportunity for a fu hearing on the question whether the granting of trackag rights by Penn-Central to D&H as contemplated by th Commission's order of April 6, 1966 (327 I. C. C. at p 528), will result in the diversion of any traffic from Read ing, and if so what protective conditions should be pre scribed.[5]

ARGUMENT

As the District Court held, "administrative proceed ings, especially of such complexity as this, would never en if parties remained free to take new positions at any tim and seek to support them with evidence that had been avail able all along." (B&O J. S., p. B-21) The Commissio did not act arbitrarily or blindly in rejecting Reading' proffer of evidence. It acted deliberately and against a background of extensive hearings, the largest record i Commission history, and an already extended delay in ef fectuating a transaction held to be in the public interest That Reading was guilty of laches cannot be questioned But it was guilty of more than laches. This was not a cas in which Reading merely slept on its rights. Rather it pur sued a deliberate and considered course of conduct tha casts a heavy doubt on the factual contention that it now advances—that the Penn-Central merger as such, and apart from the inclusion of the New Haven, will seriously injure it.

As stated above, Reading introduced no shred of evi dence of injury and made no claim of injury during the two-year period during which the original hearings in this case took place. It made no effort to amplify, explain or contradict evidence introduced by another party, consisting

[5]This hearing was provided for in the Commission's initial report of April 6, 1966. (See 327 I. C. C. at pp. 527-28)

of a letter written by the President of Reading, indicating that any injury to Reading from the merger would be insignificant. And it took no exception to the finding of the Examiners that the net effect of the merger "will not be detrimental" to Reading or to its "ability to provide a general transportation service to the public." (See pp. 3-4, *supra*)

Even in the petition for rehearing filed by Reading in June 1966, it took a position far short of that which it is now espousing. With respect to the protective conditions that the Commission had formulated for E-L, D&H and B&M its basic position was *not* that it needed comparable protection in order to survive, but rather that E-L, D&H and B&M should not receive such protection because the consequence would be injury to Reading.[6] Such a position is irreconcilable with Reading's present claim that the Penn-Central merger itself—apart from any protective conditions given other carriers—will injure Reading so drastically that it requires protective conditions in order to survive. And in attacking the Commission's finding that it would not be injured by the merger, Reading's expressed concern was *not* that reversal of that finding was essential to enable it thereafter to press for protective conditions but rather that the finding might have a collateral effect on its position in other cases—a concern that the Commission erased by modification of the form of the finding. (See p. 5, *supra*) Finally, it is surely noteworthy that on the prior hearing in this Court Reading's present contention, which if meritorious was no less relevant then than now, was not even mentioned.

Reading at various points in its brief states that its views have been altered by changed conditions, and that

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[6]Reading has had a full hearing on this contention and the Commission has rejected its position as unsupported by the facts. (See p. 4, *supra*)

this both explains and excuses its belated espousal of a new position. It asserts that "before 1965 Reading had every reason to expect that the adverse effects of the Penn-Central merger on the public served by Reading would be offset by its inclusion in C&O-B&O at or before the birth of Penn-Central" and that it is now apparent that this will not take place. (J. S., pp. 13-14) Reading makes no attempt to explain why it had "every reason" to indulge in any such expectation. The fact is that it had an excellent opportunity to seek inclusion in C&O-B&O at the time of the C&O-B&O Control case (317 I. C. C. 261 (1962)) but failed to take any steps to bring about such inclusion. More recently, it again had such an opportunity in the C&O-Western Maryland Control case. (328 I. C. C. 684 (1967)) But again, as the Commission there noted, "no representations were made by it with regard to its interests in the transaction." (328 I. C. C. at p. 706) It was only as of April 5, 1967, that Reading finally acted to petition for reconsideration of the Western Maryland Control order, requesting that the Commission direct its parents to give it financial support. That petition is pending for decision before the Commission. If it is granted Reading has achieved its goal. If it is denied Reading has available the usual judicial remedies.[7]

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[7]Reading's suggestion (J. S., p. 22) that the Commission acted with an uneven hand by imposing conditions for the Lehigh Valley Railroad, which did not appear in the Penn-Central proceeding, while refusing to hear Reading is without merit. Lehigh, as Reading itself points out, is a subsidiary of Penn, and thus might reasonably have been thought to be in no position adequately to represent its own separate interests. Moreover, Reading ignores the nature of the conditions imposed with respect to Lehigh. Those conditions basically imposed an obligation on Penn-Central to offer that road successively to C&O and to N&W, and to give it financial assistance in the meantime. (See 327 I. C. C. at pp. 554-55) If Reading is entitled to financial assistance, the Commission is in a position to impose an obligation on its parents to provide that assistance as part of its order in the Western Maryland Control case.

We submit that this claim of "changed conditions" is a mere afterthought. It was not even mentioned in the 27-page petition for reconsideration of the Commission's April 6, 1966, order filed by Reading in June 1966, despite the fact that the events that Reading now claims to have changed its earlier expectations had taken place substantially before that time. Nor was it mentioned in the complaint, brief or oral argument of Reading in the District Court in September 1966, or in its briefs or oral argument in this Court in January 1967. Under these circumstances it is patently unpersuasive as an ex post facto rationalization of Reading's belated change of position.[8]

The authorities that Reading cites in its brief do not support its position that the Commission was required as a matter of law to reopen the record to receive and consider evidence that Reading proferred for the first time when the proceedings were more than four years old and after the Commission had rendered its decision. The question whether the Commission erred must be determined on the particular facts here involved, not by reference to decisions in cases involving different facts or by reliance upon generalized and abstract propositions. Thus the assertion that "the clear statutory duty of the Commission is to consider the effects of this merger upon *every* railroad involved regardless of whatever position may be taken by the railroad on

[8]Reading also argues that it did not take the trouble to submit evidence in the original proceedings because "such evidence would not then have been relevant" because "it was unaware of the fact that the Commission would fashion special conditions to protect and indemnify small railroads pending inclusion in a large system." (J. S., p. 16) This argument cannot be taken seriously. It amounts to a contention that Reading was justifiably excused from introducing evidence of injury to it because it believed that the Commission would take no action to mitigate that injury. It is hardly credible that Reading actually proceeded on any assumption that the Commission would inevitably disregard any valid showing that it might make.

the record" (J. S., p. 13) does not justify the conclusion that a litigant which sits back while there is introduced into the record evidence in the form of a statement of its own chief executive indicating a lack of substantial adverse effect and which deliberately withholds evidence claimed to show the contrary until after the agency has made its decision is then entitled to insist that the agency committed an error of law because it did not conduct an independent inquiry and force it to produce the evidence. See *Unemployment Compensation Comm'n* v. *Aragon*, 329 U. S. 143, 155 (1946); *FPC* v. *Colorado Interstate Gas Co.*, 348 U. S. 492 (1955); *United States* v. *L. A. Tucker Truck Lines*, 344 U. S. 33 (1952).[9]

In the District Court Reading relied strongly on *Udall* v. *FPC*, 387 U. S. 428 (1967). That reliance is repeated, albeit to a lesser extent, here. The *Udall* case turned on considerations altogether different from those here presented. There the Court set aside the agency order on the ground that the basic issue (that of public as opposed to private development of the power project in question) had not been considered or explored in the administrative proceeding. In this case there has been no failure by the Commission to explore and consider all facets of the public inter-

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[9]Compare this Court's statement in United States v. Northern Pacific R. Co., 288 U. S. 490, 494 (1933):

> "Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order."

est, including the interests of Reading and its "ability to provide a general transportation service to the public." In the *Udall* case the Secretary of the Interior took no action comparable to that of Reading's here in supplying material for the administrative record inconsistent with the position that it sought later to espouse. In *Udall* the Secretary urged postponement before the administrative hearings were concluded and again before the Examiner had rendered his decision. Here, in contrast, Reading stood by until after the Commission had made its decision, failing even to except to an Examiners' finding that the merger would not injure it. And finally, in *Udall* there was no basis for concluding that the Secretary had, for tactical reasons and in his own private interest, intentionally adopted first one position and then a second one.

The ruling of the Commission and the Court below as to Reading enunciated no broad general principle of law. It was based on a detailed and particularized appraisal of Reading's conduct and the probable motivations for that conduct, and based also on the existence of record evidence that indicated that the fears that Reading now professes are greatly exaggerated. The duty of the Interstate Commerce Commission to protect the public interest can be discharged only if it is permitted to act within a framework of workable procedures. If the courts deny the Commission the discretion to decline to hear, after it has completed hearings and rendered its decision, claims and evidence that could and should have been timely presented, the administrative process will literally be incapable of final resolution.

Reading's belated insistence that it must have protective conditions pending inclusion in or financial assistance from a larger rail system is singularly unpersuasive in view of its relationship to C&O-B&O. For prac-

tical purposes Reading is now operated as a part of the C&O-B&O system. In the Western Maryland Control case, 328 I.C.C. at pp. 708-09, the Commission found that through stock ownership and interlocking directors, officers and employees B&O exercises "a substantial degree of managerial control" over Reading. There is no justification for the attempt of Reading to impose upon Penn-Central burdens that result from the failure of C&O-B&O and Reading to resolve problems that are peculiarly their responsibility. There is likewise no justification for the suggestion that in the absence of protective conditions the existence of Reading will be imperiled. As the District Court aptly observed:

> "Indeed it is still exceedingly hard to believe that B&O will see the roads affording it access to the metropolitan New York area disappear, although it naturally will do everything possible to exploit its lack of obligation to include Reading and CNJ in its own system both to minimize their commuter burden and to forward the N&W-C&O-B&O merger." (B&O J. S., p. B-22)

CONCLUSION

For all the foregoing reasons, the judgment of the District Court dismissing the complaint of Reading was clearly correct and should be summarily affirmed.

Respectfully submitted,

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